Supreme Court, U.S.
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In The
Supreme Court of The United States
October Term 1998

STEVEN GOLD, *et al.*,
Petitioners,

v.

GEORGE HARRISON, *et al.*,
Respondents.

Petition For A Writ Of Certiorari
To The Supreme Court of Hawai'i

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the First Amendment automatically protect speech from a defamation suit merely because the speech is claimed to be classified or categorized as "rhetorical hyperbole," without regard to the meaning of the speech, or alternatively, is there a constitutional privilege under the First Amendment to use "rhetorical hyperbole" regardless of whether the meaning is defamatory?

2. Where an attorney relies on decisions of this Court in bringing suit for defamation for speech that is later described by the lower courts as "rhetorical hyperbole," does the Due Process Clause require an evidentiary hearing before the imposition of sanctions against the attorney, totaling more than $45,000, for filing and then pursuing on appeal a "frivolous" suit?

3. Where parties which have never requested sanctions against Plaintiffs' counsel throughout the course of the case, including on appeal, request attorney fees and expenses after the state supreme court awards sanctions in favor of a separate party on separate issues, does the Due Process Clause require an evidentiary hearing and/or an opportunity to be heard before the new sanctions are imposed?

4. Does the imposition of sanctions on an attorney for asserting in a defamation suit that language which the state courts categorized as rhetorical hyperbole was both defamatory and actionable, have a chilling effect on the exercise of First Amendment rights of the attorney acting on behalf of his clients?

LIST OF PARTIES

Petitioners

Steven Philip Gold
Scott Howard Whitney
William H. Pickett

Respondents

George Harrison
Gannett-Pacific Corporation,
d/b/a *The Honolulu Advertiser*
Edward Tanji

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Jeffrey Thomas, "A Pragmatic Approach to Meaning in Defamation Law," — Wake Forest L. Rev. — (to be published May, 1999) [Lodging at 78-183] 13-17

OPINIONS BELOW

The opinion of the Supreme Court of Hawai'i is reported at 88 Hawai'i 94, 962 P.2d 353. [Appendix at 3.] The Amended (Final) Judgment of the Supreme Court of Hawai'i appears at Appendix 1. The opinions of the trial court on which this appeal is based appear at Appendix 39 and Appendix 43. The Order granting attorney fees to the media defendants appears at Appendix 46.

JURISDICTION

The judgment of the Supreme Court of Hawai'i was originally entered on July 8, 1998. Following a series of post-opinion motions and amended judgments, a final judgment was entered on October 22, 1998. This petition is filed within ninety days of that date. This Court has jurisdiction to review the judgment on a petition for a writ of certiorari pursuant to 28 U.S.C. §1257.

STATUTES INVOLVED

None.

STATEMENT OF THE CASE

The parties to this case are the two original Plaintiffs, Steven Philip Gold and Scott Howard Whitney, and three Defendants: George Harrison, Gannett Pacific Corporation d/b/a *The Honolulu Advertiser*, and Edwin Tanji. In view of the trial court's award of monetary sanctions against William H. Pickett, of the firm of William H. Pickett, P.C., in his capacity as lead counsel for Plaintiffs, and in favor of Mr. Harrison, Mr. Pickett is necessarily a party to, or participant in, this application for a Writ of Certiorari.

Mr. Gold and Mr. Whitney, among others, sued Mr. Harrison to enforce a recorded easement across Mr. Harrison's property, to which Mr. Harrison had denied access to Mr. Gold, Mr. Whitney and others. After the trial court sustained the plaintiffs' motion for summary judgment on the existence of an easement, Mr. Harrison was reported in *The Honolulu Advertiser*, by reporter Edwin Tanji, to have made the following statement:

> Have you ever been raped? I'm being raped by all *these* people. My privacy is being violated. The whole issue is my privacy.

The entire article in which the statement was made appears in the Lodging. [Lodging at 22-23.]

On August 11, 1993, Plaintiffs filed suit in the United States District Court for the District of Hawai'i against Mr. Harrison only. Mr. Pickett was lead counsel in that case, and the allegations in the federal suit were essentially the same as those in the instant case. On October 5, 1993, Mr. Pickett received a fax from local Hawai'i counsel informing him that, prompted by the attorney for Mr. Harrison, an interview with other reporters present at the time of Mr. Harrison's statements to the press suggested that Mr. Harrison's remarks could have been interpreted as being directed at the press or media, rather than at the landowners (including Mr. Gold and Mr. Whitney) who had just won their easement case against Mr. Harrison. [Lodging at 24-28.] On October 6, 1993, the suit against Mr. Harrison was voluntarily dismissed without prejudice. The original complaint in the present case was

filed on July 19, 1995. A First Amended Complaint was filed on July 21, 1995. [Lodging 1-21.]

Defendants Gannett Pacific Corporation and Edwin Tanji moved to dismiss the claims against them for defamation and false light invasion of privacy (the latter being a case of first impression in the state) on August 11, 1995, and filed a memorandum in support, essentially arguing that Mr. Harrison's speech was rhetorical hyperbole and therefore protected by the First Amendment to the Constitution of the United States, that there was no basis for suing either the newspaper or the reporter (Mr. Tanji) who quoted Mr. Harrison's comments in an article published in *The Honolulu Advertiser*. The newspaper article at issue in this case appears in the Lodging at 22-23.

Plaintiffs filed their memorandum in opposition to the media Defendants' motion to dismiss and the newspaper and Mr. Tanji filed a reply. On October 16, 1995, summary judgment was granted in favor of the media Defendants. [Appendix at 43-45.] As of that date, Mr. Harrison had not yet been served.

Following service on Mr. Harrison in May of 1996 (about the validity of which there was a dispute in the state courts), Mr. Harrison filed his motion to dismiss. Besides arguing that any statement by Mr. Harrison was protected by the First Amendment, Mr. Harrison also sought sanctions against Plaintiffs' lead counsel, William H. Pickett. On August 7, 1996, Plaintiffs filed their memorandum in opposition to Mr. Harrison's motion to dismiss. Mr. Harrison filed a reply memorandum on

September 9, 1996. On November 14, 1996, the trial court entered an order granting summary judgment in favor of Mr. Harrison and awarding monetary sanctions in favor of Mr. Harrison and against Mr. Pickett. Mr. Pickett sought an evidentiary hearing on the issue of the sanctions. The motion was never formally ruled upon, but implicitly was denied.

Plaintiffs filed their original notice of appeal on December 12, 1996, together with a motion to stay. The case was ultimately docketed as No. 20325 in the Supreme Court of Hawai'i. On January 7, 1997, the trial court granted the motion to stay, and Mr. Pickett deposited $17,000 with the trial court as a cash supersedeas bond. A final judgment was also entered on January 7, 1997. On January 21, 1997, Plaintiffs filed their second notice of appeal. The second appeal was docketed as No. 20468 in the Supreme Court of Hawai'i, and on motion of Plaintiffs, the cases were consolidated by order of the Supreme Court of Hawai'i, under Case No. 20468.

On July 8, 1998, the Supreme Court of Hawai'i handed down its opinion affirming the trial court, and awarding sanctions in favor of Mr. Harrison and sanctioning Mr. Pickett for pursuing the appeal, but without specifying the amount of the award. [Appendix 38.] Mr. Harrison filed several motions relating to the award of sanctions, and ultimately the Supreme Court of Hawai'i awarded Mr. Harrison $26,110.50 in attorney fees and expenses, which came to $26,689.64 with interest.

The two media defendants also filed a motion

seeking sanctions for a frivolous appeal, although they had never requested sanctions at any time in the proceeding, and although the apparent basis for the motion was that *Mr. Harrison* had been awarded attorney fees. Mr. Pickett pointed out to the Supreme Court of Hawai'i that it was a violation of his due process rights to deny him an opportunity to defend himself on the merits of whether the filing of the claims against the media defendants, and/or pursuing the appeal, were supportable under Haw. R. Civ. P. 11. Mr. Pickett supplied the Court with copies of transcripts of his consultation, prior to filing the state suit, with Professor Jeffrey Thomas of the University of Missouri-Kansas City School of Law, on the issue of whether there was a reasonable basis under the law for pursuing a suit against either or both Mr. Harrison and the media defendants. [A copy of the transcript of each of the telephone consultations of February 6, 1995, March 6, 1995, and May 17, 1995, appears in the Lodging at 29-50, 51-66, and 67-77, respectively.] . The Supreme Court of Hawai'i awarded the media defendants $3,386.25 in attorney fees [Appendix at 46.] A final judgment of the Supreme Court of Hawai'i was handed down on October 22, 1998. [Appendix at 1.] This Petition for a Writ of Certiorari is filed within ninety days of the entry of final judgment in the state case, and this Court has jurisdiction under 28 U.S.C. §1257.

ARGUMENT

This case presents a significant question of First Amendment jurisprudence which this Court should resolve:

whether the *meaning* of a statement made by a public figure about private citizens should be considered in determining whether the public figure is subject to suit for defamation, or whether there is a *per se* constitutional privilege to use "rhetorical hyperbole" regardless of whether its meaning is defamatory or not.

One of the difficulties with this case, and with the grant of summary judgment by the trial court, and the affirming by the Supreme Court of Hawai'i on appeal, is that a question remains about to whom Mr. Harrison was referring when he made his remarks about being "raped."

Mr. Harrison was quoted in *The Honolulu Advertiser*, in an article by Mr. Tanji, as making certain statements. [Lodging at 22-23.] When the media Defendants (Mr. Tanji and Gannett Pacific Corporation) moved for summary judgment, an argument was made that the statements by Mr. Harrison referred to the media. Yet an examination of the document itself clearly shows that, *as quoted* in *The Honolulu Advertiser* article, Mr. Harrison was referring to the adjacent landowners-easement owners who had sued him, a group which unquestionably includes Mr. Gold and Mr. Whitney. At that point in time the only thing known about what Mr. Harrison actually said, and the target of his remarks, was the version Mr. Tanji supplied in the newspaper article. There was a claim by Mr. Harrison's attorney, initially in the federal suit, that the article was incorrect, and either the Mr. Tanji had misquoted Mr. Harrison, or changed the context. There were clearly highly significant material facts at issue, which should have

precluded the granting of either motion for summary judgment.

While no one in the state court proceedings disputed the accuracy of the language attributed in the newspaper article to Mr. Harrison, there was a dispute over the target of those remarks. Either Mr. Harrison made the remarks, and directed them at Mr. Gold, Mr. Whitney, and the other landowners, as suggested by Mr. Tanji's article, or Mr. Harrison made the remarks directed at the media, and Mr. Tanji changed the context when he wrote the article. Regardless of the original target, however, the words are not constitutionally protected rhetorical hyperbole, despite the state courts' conclusion to the contrary.

Two decisions by this Court (both cited and argued to the trial and appellate courts below), when properly viewed, should have led to the conclusion that Mr. Harrison's words, even if quoted correctly and in the correct context, were not protected speech under the First Amendment to the Constitution of the United States: *Milkovich v. Lorain Journal Company*, 497 U.S. 1, 110 S. Ct. 2695, 2707, 111 L. Ed.2d 1 (1990), and *Masson v. New Yorker Magazine*, 501 U.S. 496, 111 S. Ct. 2419 (1991).

Plaintiffs' First Amended Complaint necessarily speaks for itself in terms of what Plaintiffs' allegations are concerning the defamatory language used about them by Mr. Harrison. [Lodging at 1-21.] Paragraph 11 of the First Amended Complaint quoted Mr. Harrison's statement from the newspaper article as follows:

> Have you ever been raped? I'm being

raped by all these people. My privacy is being violated. The whole issue is my privacy.

Although Mr. Harrison claimed his remarks referred to the media, in Mr. Tanji's article, Mr. Harrison's language narrowly focused his derogatory remarks on a specific group of people: the landowners who had just been successful in obtaining judicial confirmation that they had an easement over Mr. Harrison's property in Hawai'i which pre-dated Mr. Harrison's purchase of that land, and Mr. Gold and Mr. Whitney are both among those landowners.

While it is true that there was a prior case filed by these Plaintiffs against Mr. Harrison in the United States District Court for the District of Hawai'i, making essentially the same allegations against Mr. Harrison only, and while it is true that Mr. Harrison filed a motion to dismiss in that case, and while it is also true that Plaintiffs voluntarily dismissed their claims in the federal court after a claim by Mr. Harrison's lawyer that Mr. Harrison's remarks were directed at the media, those facts had no proper bearing on the issue of whether Mr. Harrison's remarks were actionable.

Mr. Harrison's counsel described the motion to dismiss in the federal case as notice to Plaintiffs that their claims were spurious, as if the mere fact that Mr. Harrison alleged that a claim was spurious necessarily made it so. Mr. Harrison's counsel also attributed the dismissal of the federal suit as an admission by Plaintiffs that the dismissal occurred after learning that Harrison's statements were directed at overzealous reporters, not them. The reason for

the federal case dismissal, however, was clearly to *evaluate* the existence of potential claims against Mr. Tanji and *The Honolulu Advertiser*, including the possibility of both defamation and false light invasion of privacy claims. A decision to dismiss a case without prejudice cannot be equated with any "admission" that the assertion that Mr. Harrison's remarks were directed at the media was in fact true. Since the presence of Hawai'i citizens would obviously destroy federal diversity jurisdiction, Plaintiffs simply exercised their right to refile the case in state court, alleging alternative theories of recovery. Further, Mr. Harrison implicitly argued, and was successful in doing so, that any attorney who files a defamation suit where the language at issue is determined later by the court to be rhetorical hyperbole, is automatically subject to sanctions for the mere filing of the suit, without regard to whether the meaning of the words is in fact defamatory. That ruling, if allowed to stand, has a chilling effect which would eliminate all such suits, and all such challenges to what some courts believe to be the current status of the law.

Mr. Harrison successfully argued below that merely because a particular statement is tagged with the description rhetorical hyperbole it is automatically protected speech under the First Amendment, and therefore cannot form the basis for a defamation suit.

That is not a correct statement of the law.

This Court has expressly held that there is no per se privilege under the First Amendment for "opinion." *Milkovich v. Lorain Journal Company*, 497 U.S. 1, 110 S.

Ct. 2695, 2707, 111 L. Ed.2d 1 (1990). The Court noted at 2706 that the damage done by a defamatory statement can be equally strong, regardless of whether the speaker says "Jones is a liar" or "in my opinion Jones is a liar," and pointed out that even at common law, "the privilege of fair comment did not extend to a false statement of fact, whether it was expressly ~~stated~~ or implied from an expression of opinion.' Restatement (Second) of Torts, *supra*, '566 Comment *a*." *Id.* Thus, where a First Amendment defense is raised in a defamation case, an appellate court has an obligation to make an independent examination of the entire record to "make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Id.* at 2705. The Supreme Court found that the suggestion that the connotation of the language in the newspaper article that the plaintiff had perjured himself was "sufficiently factual to be susceptible of being proved true or false," *id.* at 2707, and before reversing the trial court and remanding, the Supreme Court said at 2707-2708:

> The numerous decisions discussed above establishing First Amendment protection for defendants in defamation actions surely demonstrate the Court's recognition of the Amendment's vital guarantee of free and uninhibited discussion of public issues. But there is also another side to the equation; we have regularly acknowledged the "important social values which underlie the law of defamation," and recognize that "[s]ociety has a

pervasive and strong interest in preventing and redressing attacks upon reputation." [Citation omitted.] Justice Stewart in that case put it with his customary clarity:

> "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being, a concept at the root of any decent system of ordered liberty.
>
> . . .
>
> "The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored." [Citation omitted.]

"Rhetorical hyperbole" is necessarily an aspect of the expression of an opinion, and it follows that the analysis which must be conducted of the statements alleged to be defamatory, regardless of whether the analysis is conducted in the context of a motion to dismiss or a motion for summary judgment, is one which determines whether reasonable minds can differ on that issue. Where Mr.

Harrison has claimed that his statements were directed to the press, and "understood" by members of the press to have that meaning, but where it is clear from the context of the newspaper article published by *The Honolulu Advertiser*, considered as a whole, that his statement was directed at Mr. Gold, Mr. Whitney and the other landowners who had been successful in obtaining judicial confirmation of their easement across Mr. Harrison's property, then there was a factual dispute which should have been resolved by a jury and not by the trial court.

In *Masson v. New Yorker Magazine*, 501 U.S. 496, 111 S. Ct. 2419 (1991), the Supreme Court found at 2435 that describing a teacher and author as an "intellectual gigolo" was actionable. The *Masson* phrase obviously means one who prostitutes his ideas for pecuniary gain. While one could argue that the phrase was merely rhetorical hyperbole used to express a negative opinion about someone, the Supreme Court's decision that the phrase was actionable meant that the issue was one for the jury to resolve.

Both *Milkovich* and *Masson* involved a focus by this Court on the *meaning* of the allegedly defamatory remarks, prior to a determination of whether they were actionable or protected by the First Amendment. Yet that is precisely what both the trial court and the Supreme Court of Hawai'i failed to do: they classified the remarks made by Mr. Harrison as rhetorical hyperbole, regardless of whether they were quoted accurately or not by Mr. Tanji, as to the reference, and concluded that all rhetorical hyperbole

is automatically protected speech under the First Amendment. In other words, speech which is categorized as rhetorical hyperbole enjoys an absolute and per se constitutional privilege against being actionable.

This view—that certain types or categories of speech are automatically protected by the First Amendment merely because of their status—has grown in recent years to the point where the common law tort of defamation seems to have shifted its primary focus from whether the challenged speech has defamatory meaning which harmed the plaintiff, to whether the challenged speech has some constitutional privilege.

Jeffrey E. Thomas, Assistant Professor, University of Missouri-Kansas City School of Law, has recently analyzed the state of American defamation law in relation to the importance that courts place on the meaning of an allegedly defamatory statement, and developed a pragmatic approach for *first* determining whether a statement has defamatory meaning, so that the question of whether the statement has any constitutional privilege can be determined in light of the meaning, and not in spite of it, or in complete disregard of meaning. The article is titled, "A Pragmatic Approach to Meaning in Defamation Law," and will appear in the Wake Forest Law Review in May of 1999. A copy of that article appears in the Lodging at 78-183. Professor Thomas' article discusses the definition of "meaning," the growth of constitutional privileges for categories of speech, and suggests a pragmatic approach to determine the *meaning* of a statement before consideration

of whether the statement is protected by the First Amendment.

> This meaning-based distinction for hyperbole is consistent with usual communicative discourse and supports the objective of protecting reputation. Recipients of communication seek to understand the meaning of a statement even when hyperbole is used. If the context shows that the meaning of a term like "blackmail" or "slut " is not defamatory because it was used figuratively, that is how the reader will understand it. But if the context shows a defamatory meaning, the reader will not ignore that meaning simply because it was conveyed with rhetorical hyperbole. The categorical approach does not permit this distinction, but categorically protects all statements of hyperbole regardless of their meaning. Because the categorical approach protects some rhetorical hyperbole that conveys defamatory meaning, it diminishes the ability of defamation law to protect reputation.

[Lodging at 180-181.] Professor Thomas then concluded:

> Meaning is essential to defamation. Without meaning a statement would not harm a person's reputation, and therefore would not require any compensation. The common law has long recognized a doctrinal role for meaning in defamation law. The constitutional law of defamation, however, created a large and complex

> body of law that marginalized meaning and distorted the use of linguistic factors that help determine meaning. This body of law became the focus of defamation litigation instead of the meaning, or truth or falsity, of the allegedly defamatory statement. In addition, categorical protection for statements of opinion and rhetorical hyperbole distorted the use of linguistic factors of text and context. Instead of using these factors to determine a statement's meaning, these doctrines used them to classify the statements as fact, opinion or hyperbole. The average reader, however, is more concerned with the meaning of the statement than with its categorization as fact or opinion. Furthermore, rigid categories of fact, opinion, and hyperbole fail to reflect the mixed nature of most statements. Even if they did try to classify a statement, most statements have both factual and non-factual dimensions.

Id. at 181.

Applying Professor Thomas' pragmatic paradigm to the speech at issue here reveals that Mr. Harrison's statements *do* have a defamatory meaning. When read in light of the context, it is clear that the statement—"Have you ever been raped? I'm being raped by all these people"—accuses those people of violating Mr. Harrison's privacy by using gross criminal-like acts in enforcing their legal rights. The verbal context of the statement shows that the statement is referring to Mr. Harrison's claims of

privacy violation. Immediately after the statement at issue, the article says that "Harrison told reporters, 'My privacy is being violated. The whole issue is my privacy.'" In addition, the headline of the article stated: "Ex-Beatle says of trial on Maui: Don't rob my privacy, no, no, no." The term "rape" therefore refers to how the violation of Mr. Harrison's privacy occurred.

This violation of privacy, however, was not with a literal act of "rape," but was by the efforts of the litigants to enforce and use an easement over Mr. Harrison's property, which had been granted to the litigants by deed and which had been used by them prior to Mr. Harrison's later acquisition of the property. The subject of the article was the "trial on whether [Harrison's] neighbors can use a path near his private home in Nahiku." The term "rape" in this context therefore is metaphorical, not literal. The metaphor refers to the criminal mental state and accompanying improper acts of the litigants in winning. Rape is forcible or nonconsensual sexual intercourse. By using that term metaphorically in the context of this article, the average reader would understand that the speaker's point was to accuse the litigants of using gross, criminal-like acts to enforce their legal rights and violate Mr. Harrison's privacy.

The maxims of what Professor Thomas calls "conversational implicature" also support this understanding of the statement's meaning.

The maxim of "relation" requires that the statement must be relevant to the discourse, or the subject. It is clear

from the above analysis that the discourse concerns Harrison's privacy, and therefore that the statement about "rape" concerns Harrison's privacy.

The maxim of "manner" suggests that the discourse will be orderly and avoid obscurity, so that the use of the term "rape" in this context must be metaphorical. That does not mean that the statement is without meaning, however.

The maxim of "quantity" suggests that the speaker (Mr. Harrison) will provide information required by the discourse, so that the statement must in some fashion advance the discourse. The most obvious way that the statement advances the discourse here is by metaphorically describing the intent and/or actions of the litigants, which of course includes Mr. Gold and Mr. Whitney.

The maxim of "quality" suggests that the speaker will only make statements for which he has evidence. Thus, based on Mr. Harrison's involvement in the underlying easement litigation, the reader would assume that Mr. Harrison had some basis for attributing improper criminal intent and/or criminal-like methods to the litigants in pursuing their legal rights.

As can be seen, there *is* a defamatory meaning to Mr. Harrison's words, whether the analysis is one consistent with Professor Thomas' "pragmatic paradigm" or whether the speech is viewed as metaphorically accusing Mr. Gold, Mr. Whitney and the others of criminal conduct similar to rape in their litigation efforts.

Despite the trial court's assertion in granting

summary judgment in favor of Mr. Harrison that there was "no good faith allegation or contention that the allegation of rape was anything more than colorful non-factual figurative speech, regardless of the identity of the persons at whom the remarks were targeted," [Appendix at 40], there is absolutely nothing in this record to demonstrate that the argument was anything other than a good-faith argument. The reality is that Plaintiffs' counsel was unsuccessful in persuading the trial court that his interpretation of the relevant law—*Milkovich* and *Masson*—was correct, and as "punishment" for unsuccessful advocacy, not only was summary judgment granted in favor of Mr. Harrison, but sanctions were awarded against Mr. Pickett.

Considered in the context of the entire article, and considered in light of the fact that there is some uncertainty about to whom Mr. Harrison was directing his statements, and thus the grant of summary judgment in favor of *any* of the Defendants was in conflict with the principles of both *Milkovich* and *Masson*. Both the trial court and the Supreme Court of Hawai'i clearly ignored any question of the meaning of the Harrison statements, focused solely on whether the statements could be categorized as rhetorical hyperbole, and then concluded that all rhetorical hyperbole is per se protected by the First Amendment, and therefore anyone who questions that per se protection is acting frivolously.

This Court should grant certiorari: (1) to determine whether or not there is an automatic, per se constitutional privilege under the First Amendment for speech that can be

categorized as rhetorical hyperbole, (2) to determine whether the *meaning* of a statement must be determined before consideration of any constitutional privilege, and (3) to determine whether the decision of the Supreme Court of Hawai'i in this case conflicts with the holdings and principles of *Milkovich* and *Masson*.

The leading Hawai'i case on the issue of Rule 11 sanctions in the form of attorney fees is *Enos v. Pacific Transfer & Warehouse, Inc.*, 79 Haw. 452, 903 P.2d 1273 (1995). In *Enos*, the plaintiff had obtained a judgment, and prior to the posting of any supersedeas bond, sought to execute on the judgment and instituted a proceeding to examine a third party concerning assets of Pacific Transfer. The supersedeas bond was posted, but the examination proceeding was not withdrawn quickly, and the trial court awarded sanctions against one of Pacific Transfer's counsel. After quoting Hawai'i Rule of Civil Procedure 11 (which is virtually identical to Fed. R. Civ. P. 11), the Supreme Court of Hawai'i said:

> "The cornerstone of Rule 11 is the certification requirement; that is, Rule 11 sanctions must be based on the signature of an attorney or client on a pleading, motion, or other paper in a lawsuit." [Citations omitted.] Rule 11 'does not license a court to sanction any action by an attorney or party that it disapproves of[.]" [Citations omitted.]

Enos, *supra*, 79 Haw. at 458, 903 P.2d at 1279. The Court said later that in order to facilitate meaningful and efficient

appellate review, "an order imposing sanctions should set forth findings that describe, with reasonable specificity, the perceived misconduct (such as harassment or bad faith conduct), as well as the appropriate sanctioning authority...." *Id.*, 79 Haw. at 459, 903 P.2d at 1280. The trial court awarded sanctions against Mr. Pickett with the ruling that appears at Appendix at 41.

What the trial court was really saying was that because it disagreed with Mr. Pickett's interpretation of existing law on the issue of rhetorical hyperbole; because Mr. Pickett did not persuade the trial court that his interpretation and understanding of the applicable law was correct; because Mr. Pickett, on behalf of his clients, previously exercised a right under Fed. R. Civ. P. 41 to voluntarily dismiss a case without prejudice and then re-file the case; because Mr. Pickett exercised his clients' right under HRCP 8(e)(2) to plead inconsistent theories, and because Mr. Pickett did not accept the trial court's ruling on the Gannett/Tanji motion for summary judgment as being correct, Mr. Pickett should be punished with $12,504.48 in sanctions, which with interest totaled $15,092.63.

None of those grounds, individually or collectively, were sufficient to support the imposition of sanctions against Mr. Pickett, nor was the fact that Mr. Pickett was unsuccessful in persuading the Supreme Court of Hawai'i that his view of the proper interpretation of *Milkovich* and *Masson*, in particular, was correct, warrant the imposition of further sanctions totaling $30,189.65 between the award to Mr. Harrison and the award to the media defendants.

But of even greater significance is the fact that at no time was Mr. Pickett allowed to present evidence at a hearing to defend the assaults being made on his integrity.

In opposition to the Gannett/Tanji motion for summary judgment on the defamation and false light invasion of privacy claims, Mr. Pickett argued the question of rhetorical hyperbole in the context of existing law. He attempted in good faith to persuade the trial court that there was a viable claim against the newspaper defendants, if they had in fact made up the statements attributed to Mr. Harrison, or if they had quoted the language correctly, but then in the published article, directed the statement to the litigants instead of to the media, which was the target asserted by Mr. Harrison. Mr. Pickett was unsuccessful in doing so, but a mere lack of success in persuading a trial court to deny the first of two motions for summary judgment hardly constitutes a basis for imposing sanctions, particularly where the sanctions are imposed *not* on the basis of Mr. Pickett's actions in defending the first motion for summary judgment but because he did not give up the case and dismiss the claims against Mr. Harrison, and instead proceeded to represent his clients by pursuing the claim against the remaining defendant in the case.

The trial court pointed out that the arguments against the newspaper defendants and Mr. Harrison were inconsistent. If the arguments were inconsistent, then following a ruling in favor of the newspaper defendants, what impropriety could there be, particularly an "impropriety" warranting imposition of sanctions, in

pursuing the claim against the remaining defendant? The answer is, "None." What the trial court was really saying was that it was punishing Mr. Pickett for not agreeing with the trial court's ruling on the newspaper defendants' motion for summary judgment, and inferentially, for not immediately dismissing the case against Mr. Harrison. As the record reflects, Mr. Harrison had not yet been served as of the date of the trial court's granting of summary judgment in favor of the media defendants. Therefore all issues and claims against all parties had not been decided and the grant of summary judgment in favor of the newspaper defendants was not then appealable. Nothing in the law requires a party who loses a motion for summary judgment as to one defendant in a multi-defendant case to seek certification for an immediate appeal. Instead, Mr. Pickett properly represented his clients by pursuing the claim against Mr. Harrison so that if the claims against Mr. Harrison were dismissed, thereby disposing of all claims and issues against all parties, then the matter would be ripe for an appeal.

The trial court cited no authority for the proposition that sanctions under Rule 11 may be imposed because an attorney fails to persuade the trial court that his legal arguments are correct.

The trial court cited no authority for the proposition that the exercise of a right under the Federal Rules of Civil Procedure to voluntarily dismiss a case without prejudice and then re-file it, can serve as a reason for imposing sanctions on the attorney who does so. The fact was that

the original federal suit was against Mr. Harrison alone, during which it came to the attention of Plaintiffs' counsel from Mr. Harrison's counsel that there was a possibility that Mr. Harrison was directing his rape comments at the media, but that the present newspaper defendants had either distorted what Mr. Harrison said to make it appear his comments were directed at Plaintiffs and other landowners adjoining Mr. Harrison's Hawai'i property, or had perhaps even misquoted him completely. The legal effect of a voluntary dismissal without prejudice is clearly as if the case had never been filed in the first place. It may never in fact be re-filed, or it may be re-filed within the appropriate "savings" period that permits a voluntarily-dismissed suit to be re-filed. The latter is what happened in this case. Plaintiffs had a right to voluntarily dismiss the federal suit. They did so. Plaintiffs had a right to re-file that suit against the original defendant (Mr. Harrison) and name additional defendants (the media defendants). They exercised that right. There is nothing in the law that says the exercise of rights granted by federal or state statutes or rules of civil procedure can serve as the basis for imposition of sanctions.

At the stage at which this defamation litigation ended in the state courts (with Mr. Harrison's appeal of his loss of the easement case still pending in the Supreme Court of Hawaii' since 1994), the only thing really known about what Mr. Harrison may or may not have said is what was reported in *The Honolulu Advertiser* newspaper article. Whether the words were quoted correctly, and whether the

words were aimed at the media or at Plaintiffs and other adjoining landowners is in fact unknown as a matter of law, since there are two conflicting versions: the newspaper article targeted the landowners and Mr. Harrison claims he targeted the media. Mr. Pickett made an unsuccessful legal argument against Mr. Harrison's motion for summary judgment. The argument, even though found to be unpersuasive or erroneous by the trial court, certainly did not demonstrate the "bad faith" which was implicit in the trial court's assertion that Plaintiffs, through Mr. Pickett, sought to "ignore controlling precedent and to misapply prevailing constitutional doctrine."

Taken as a whole, the trial court seemed really to be punishing Mr. Pickett for disagreeing with the trial court's ruling on the rhetorical hyperbole issue in the Gannett/Tanji motion for summary judgment. If Mr. Pickett had given up at that point and gone away, then there would have been no imposition of sanctions. The Gannett/Tanji motion was decided on the basis that whatever Mr. Harrison said was constitutionally protected hyperbole, yet the trial court did not feel at that time that Mr. Pickett had violated Rule 11. It was only when Mr. Pickett implicitly disagreed with that ruling, and pursued the claim against Mr. Harrison so that if he was unsuccessful there all the issues might be resolved on appeal, that the trial court decided Mr. Pickett should be sanctioned. Yet the document out of which these Rule 11 sanctions arose, Mr. Pickett's signature on the Complaint and/or the First Amended Complaint are identical as to the rhetorical hyperbole issues in both motions for summary

judgment.

Nothing in this record demonstrates any kind of bad faith which would warrant imposition of these sanctions, and the record considered in its entirety demonstrates that the trial court abused its discretion by awarding sanctions in any amount against Mr. Pickett. Before granting the sanctions, the trial court should have held an evidentiary hearing, and therefore these sanctions violated Mr. Pickett's right to due process under the Fifth and Fourteenth Amendments to the Constitution of the United States.

The Supreme Court of Hawai'i has recognized the fundamental concept that due process requires notice and a meaningful opportunity to be heard in *Evans v. Takao*, 74 Haw. 267, 282, 842 P.2d 255, 262 (1992), and in *Kernan v. Tanaka*, 75 Haw. 1, 22, 856 P.2d 1207, 1218 (1993). Similarly, this Court has said in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538, 105 S. Ct. 1487, 1491, 84 L. Ed.2d 494 (1985):

> Property interests are not created by the Constitution, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law...." [Citations omitted.]

And this Court later said:

> The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures.

Id., 470 U.S. at 541, 105 S. Ct. at 1493. Once it is clear the

Due Process Clause is applicable a particular situation, "the question remains what process is due." *Id.*

> An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 313, 70 S. Ct. 652, 656, 94 L.Ed. 865 (1950). We have described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." [Citations omitted.]

Id., 470 U.S. at 542, 105 S. Ct. at 1493.

Yet the trial court in this case was permitted to ignore both its own highest court's statement of constitutional due process principles, and clearly ignored the same principles enunciated by *this* Court, by failing to provide an evidentiary hearing to Mr. Pickett after his request for one, on the issue of the imposition of sanctions against him. And the Supreme Court of Hawai'i did the same thing by imposing sanctions against Mr. Pickett for filing an allegedly frivolous appeal as to the summary judgment granted in favor of the media defendants, without providing Mr. Pickett an effective opportunity to be heard. It should be remembered that the Supreme Court of Hawai'i went straight from a decision that pursuing an appeal of the decision in favor of Mr. Harrison was frivolous, to determining the amount of sanctions to be awarded against

Mr. Pickett in favor of the media defendants, without the intervening step of first allowing Mr. Pickett an opportunity to demonstrate that there was not only a legitimate basis for the initial suit against all defendants, but for pursuing the appeal against the media defendants as well.

The request for sanctions by Mr. Harrison in the trial court and on appeal placed Mr. Pickett's integrity at issue. So did the post-appeal request of the media defendants. The ruling against Mr. Pickett on those requests for sanctions clearly deprived him of property: initially a $12,504.48 (with interest, $15,092.63) award of attorney fees and expenses to Mr. Harrison, and later another $30,189.65 to Mr. Harrison and the media defendants on appeal. The denial of an evidentiary hearing deprived Mr. Pickett of his property (a substantial sum of money), with absolutely no meaningful opportunity to be heard. The denial of a hearing deprived Mr. Pickett of the right to explain directly to the trial court and in detail, his reasoning, or for example, whether he consulted experts before deciding to file suit in the first place. The request for sanctions placed Mr. Pickett's credibility at issue, and he should have been given an opportunity to testify in his own behalf, and/or to offer expert testimony to show that there was a legally sound basis for filing the suit in state court and for pursuing the appeal, and that he acted in good faith, consistent with the principles of H.R.C.P. 11, for filing the suit and pursuing it on appeal.

Mr. Pickett has paid more than $45,000 in sanctions. It can hardly be argued that Mr. Pickett does not

have a constitutionally-protected interest in due process before he is compelled by order of a state court to pay money to someone else. Mr. Pickett requested an evidentiary hearing on the issue of sanctions. No such hearing was held. Yet Mr. Pickett has a constitutionally-protected right to be heard in his own behalf not only on the propriety of the imposition of sanctions at all, but on the nature and extent of those sanctions. The state courts' denial of any evidentiary hearings on the question of sanctions deprived Mr. Pickett of an opportunity not only to challenge the amount of attorney fees and expenses being sought, but to challenge the merits of the claim that sanctions should be imposed at all, just because Mr. Pickett filed and then pursued these defamation and other tort claims against these defendants. The imposition of sanctions by the Supreme Court of Hawai'i was at least as constitutionally defective, since the sanctions were imposed at least in part because Mr. Pickett did not make any "new" arguments on appeal, but rather tried to persuade the Supreme Court of Hawai'i that the trial court had erred in the first place in its interpretation of *Milkovich*, *Masson*, and the other cases cited and argued.

But where the Supreme Court of Hawai'i, in *Enos*, *supra*, has placed such a high degree of emphasis on the necessity for careful consideration and articulation of the bases for imposition of Rule 11 sanctions and/or imposition of sanctions under a trial court's "inherent powers," it should follow that an evidentiary hearing is constitutionally necessary, and is particularly necessary where the non-

moving party requests the opportunity to be heard.

Imposition of financial sanctions against an attorney is essentially a mini-trial proceeding. There must be a basis in fact for imposition of sanctions, and legal authority to do so. This is no different than any civil litigation, where there must be both a legal and factual basis for an award of damages in favor of a plaintiff. It would certainly be a violation of a defendant's due process rights in a civil case for the trier of fact to determine liability based solely on written arguments of the parties, and then determine the amount of damages to be awarded based solely on evidence presented by the plaintiff, without allowing the defendant any opportunity to rebut that evidence. There is no difference between that situation and the one in the trial court below. By denying an evidentiary hearing, the trial court deprived Mr. Pickett of the right to make a meaningful challenge to both the issue of imposition of sanctions, the nature of the sanctions, and if the sanctions were to be monetary, to the amount of sanctions.

The imposition of sanctions in this setting also raises a significant question of the chilling effect of the use of a court's authority to impose sanctions against attorneys where the attorney does nothing more than rely on a valid interpretation of two of this Court's then-most-recent decisions on the use of meaning in defamation law, *Milkovich* and *Masson*, to try to persuade first a trial court and then an appellate court that a particular statement, considered in context and with reference to the meaning which would be ascribed to it by ordinary readers, was

defamatory and tortious, regardless of whether or not the statement could be categorized as rhetorical hyperbole.

This Court should grant this Petition for a Writ of Certiorari in order: (1) to determine whether the Due Process Clause requires an evidentiary hearing on the issue of Rule 11 sanctions in a factual setting such as this one, and/or (2) to determine the nature and extent of a meaningful opportunity to be heard under the Due Process Clause with reference to the imposition of sanctions, and/or (3) to determine whether the imposition of sanctions for an unsuccessful argument over the interpretation of this Court's cases has a chilling effect under the First Amendment on the vigorous representation by attorneys of their clients.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari to the Supreme Court of Hawai'i should be granted.

Respectfully submitted,

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